Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

LUCAS P. BAEZ,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly held, in conflict with rulings of the Third, Sixth, Eighth and Ninth Circuits, that Section 106(c) of the Immigration and Nationality Act precludes judicial review of final orders of deportation after an alien has been deported, even if the deportation was illegally executed and/or violated the alien's rights under the Due Process Clause of the Fifth Amendment to the United States Constitution.

2. If so, whether Congress constitutionally can preclude judicial review of final agency adjudications to consider claims asserting colorable violations of the Due Process Clause of the Fifth Amendment to the United States Constitution.

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Lucas P. Baez respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals (App., *infra*, 1a-14a) is reported at 41 F.3d 19. The decisions of the Board of Immigration Appeals (App., *infra*, 17a-28a) are unreported. The decision of the immigration judge (App., *infra*, 29a-41a), is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 6, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 106(c) of the Immigration and Nationality Act, 8 U.S.C. § 1105a(c), provides, in pertinent part, that "[a]n order of deportation or of exclusion shall not be reviewed by any court if the alien * * * has departed from the United States after the issuance of the order." Section 106 is reproduced in its entirety at App., *infra*, 44a-48a. The Due Process Clause of the Fifth Amendment to the United States Constitution provides that "No person shall be * * * deprived of life, liberty, or property, without due process of law." U.S. CONST. AMEND. V. Article III of the United States Constitution is reproduced in its entirety at App., *infra*, 42a-43a.

STATEMENT

This case presents for review the question left open by this Court in *United States v. Mendoza-Lopez*, 481 U.S. 828, 837 & n.13 (1987), of whether final orders of deportation are subject to judicial review after an alien has been deported. The court of appeals, in conflict with decisions of the Third, Sixth, Eighth and Ninth Circuits, held that § 106(c) of the Immigration and Nationality Act ("INA") categorically bars judicial review of such orders once an alien is deported—even if the deportation is illegally executed and violates the alien's rights under the Due Process Clause of the Fifth Amendment to the Constitution. In reaching that conclusion, the court followed similar rulings by the Second, Fifth and Tenth Circuits.

As the court of appeals recognized, "[t]he courts of appeals have divided on whether this statute signifies what it

appears to say." App., *infra*, 1a-2a. In fact, the courts of appeals have split in at least three different directions in attempting to discern the jurisdictional significance of § 106(c), so much so that the courts have recognized that "[o]bviously, the question of how deportation affects an alien's right to make various claims in court calls for resolution by the Supreme Court." *Bar-Levy v. United States Dep't of Justice*, 990 F.2d 33, 36 (2d Cir. 1993). This Court should grant the petition to resolve the conflict among the circuits on this important and recurring question of law.

1. Petitioner Lucas P. Baez is a native of the Dominican Republic who entered the United States as a lawful permanent resident on April 20, 1972, at the age of 12. On March 5, 1987, the INS issued an order to show cause charging petitioner with deportability, based upon his conviction for distribution of a controlled substance. At the hearing before the Immigration Judge, petitioner conceded deportability, but sought relief from deportation under Section 212(c) of the Act, 8 U.S.C. § 1182(c), based upon evidence of his rehabilitation, remorse and extensive family ties in the United States, including two financially-dependent children, his parents, two brothers and two sisters. On June 16, 1989, the Immigration Judge granted petitioner's application for relief from deportation "[b]ased on the favorable factors of extended residence, family ties, the number of letters attesting to [petitioner's] rehabilitation and [the fact that he is] no longer involved in any criminal matter, and a separation that would be caused to his children and family* * *." App., *infra*, 40a-41a.

2. The INS appealed to the Board of Immigration Appeals in July 1990, after which the case laid dormant for more than 3 years. On September 30, 1993, the Board, in a split decision, reversed the Immigration Judge's decision, citing various "adverse factors" presented by petitioner's case, but overlooking the favorable factors relied upon by the Immigration Judge.

Board Member Mary Maguire Dunne dissented, concluding that "[t]he immigration judge carefully and fully weighed and balanced the adverse factors in this case against the favorable factors and found that [petitioner] had established that he should be granted discretionary relief from deportation. Without pointing to a single factual or legal error on the part of the immigration judge in reaching his decision, the majority simply substituted its judgment for his." App., *infra*, 28a.

Petitioner's counsel, Paul F. Murphy, never was served with a copy of the Board's decision. On November 22, 1993, at 11:15 p.m., Murphy received a telephone call at his home from petitioner's sister, who informed him that petitioner had been taken into custody by INS officers for the purpose of deporting him. Counsel telephoned the INS detention center from his home early on November 23, and was then informed for the first time that petitioner's grant of relief from deportation had been reversed by the Board and that petitioner would be deported later that day. Having not yet seen a copy of the Board's decision or reviewed petitioner's file in more than 3 years, counsel quickly prepared an emergency motion for stay of deportation and to reopen the proceedings before the Board based upon the fact that he had not been properly served with or notified of the Board's decision, and had not been given sufficient time to petition the court of appeals for review. Counsel filed the motion with the local Immigration Judge at approximately 12:00 p.m. on November 23, at which point he obtained a copy of the Board's decision. The Immigration Judge forwarded petitioner's motion to the Board via facsimile. At 1:00 p.m., counsel provided an oral statement to the sole Board Member then available via telephone in which he explained that he had not been served with a copy of the Board's decisions and did not have sufficient notice of petitioner's deportation. At approximately 4:30 p.m., counsel received

a telephone call advising him that the motion for stay had been denied. App., *infra*, 3a-4a, 18a.

Petitioner was deported during the early morning hours of November 24—less than 36 hours after his counsel was notified of the impending deportation, and only 18 hours after counsel obtained a copy of the Board's decision and final order of deportation. On December 13, the Board denied petitioner's motion to reopen by operation of law based solely upon the fact that he had been deported. App., *infra*, 17a.

3. Petitioner filed a timely appeal with the First Circuit, challenging the Board's decision denying him relief from deportation and denying his motion to reopen. The INS moved to dismiss the appeal pursuant to § 106(c) of the Act, arguing that petitioner's deportation precluded judicial review of the Board's orders. Petitioner opposed the motion on the grounds that counsel had not been properly notified of the Board's final order of deportation or of the deportation itself.

The court of appeals, noting that "courts have split on the question of whether [§ 106(c)'s] jurisdictional bar is subject to a due process exception," ordered the parties to brief "the issue of whether counsel's eleventh-hour notice of the scheduled deportation might trigger a possible exception to [§ 106(c)] -- a matter of some dispute." App., *infra*, 15a-16a. Ultimately, however, the court held that despite petitioner's claims that his deportation was executed without proper notice to counsel and violated his right to due process, the court was "powerless to reach the merits of these asseverations * * * for petitioner's deportation deprives this court of subject matter jurisdiction over the request for judicial review." App., *infra*, 7a.

In examining the question of subject matter jurisdiction, the court of appeals explained that "the statute's plain meaning must prevail, and, therefore, an alien's departure from the United States, whether voluntary or involuntary, deprives the

federal courts of jurisdiction to entertain challenges to an antecedent order of deportation. Because the instant petition solicits judicial inquiry into the correctness of the deportation order that brought about petitioner's departure, we dismiss it for want of appellate jurisdiction." App., *infra*, 2a.

The court acknowledged that other circuits, following the Ninth Circuit's decision in *Mendez v. INS*, 563 F.2d 956 (1977), "have read exceptions into [§ 106(c)], thereby softening its impact and authorizing post-deportation review under certain circumstances." App., *infra*, 8a-9a, citing *Zepeda-Melendez v. INS*, 741 F.2d 285, 287-88 (9th Cir. 1984); *Thorsteinsson v. INS*, 724 F.2d 1365, 1367-68 (9th Cir.), cert. denied, 467 U.S. 1205 (1984); *Estrada-Rosales v. INS*, 645 F.2d 819, 820-23 (9th Cir. 1981); *Juarez v. INS*, 732 F.2d 58, 59-60 (6th Cir. 1984); *Camacho-Bordes v. INS*, 33 F.3d 26, 27-28 (8th Cir. 1994); *Marrero v. INS*, 990 F.2d 772, 777 (3d Cir. 1993). The court noted, however, that "[a]t least three other circuits have given *Mendez* a distinctly unfavorable reception." App., *infra*, 9a, citing *Umanzor v. Lambert*, 782 F.2d 1299 (5th Cir. 1986); *Quezada v. INS*, 898 F.2d 474, 476-77 (5th Cir. 1990); *Saadi v. INS*, 912 F.2d 428, 428 (10th Cir. 1990); *Roldan v. Racette*, 984 F.2d 85, 90 (2d Cir. 1993).

After examining these conflicting interpretations of § 106(c), the court rejected *Mendez* and sided with those circuits that have read the statute as an absolute bar to post-deportation judicial review. App., *infra*, 10a. The court also held that judicial review is unavailable even if the deportation colorably violates the alien's constitutional right to due process:

> A judge-made exception to section [106(c)'s] jurisdictional bar, even one limited to "colorable" due process claims--whatever that term may eventually come to mean--can too easily expand to engulf the

> general rule prohibiting review and thereby thwart achievement of the congressional goal.

App., *infra*, 12a (citation omitted). The court further concluded that this "strict construction that the language of the statute demands passes constitutional muster. Congress has broad discretion to restrict access to the lower federal courts. Hence, we perceive no constitutional infirmity in the outright denial of appellate review following an alien's deportation." App., *infra*, 12a n.7 (citation omitted).

Based upon this reasoning, the court held (App., *infra*, 12a), that it lacked jurisdiction to review the Board's final order of deportation and its denial of petitioner's motion to reopen:

> We join those of our sister circuits that have followed the plain language of section [106(c)] and found its jurisdictional bar to be absolute. Reading the statute in that manner, the petitioner's involuntary departure from the United States deprives us of jurisdiction to examine the correctness of either the underlying deportation order or the Board's disposition of the motion to reopen. Accordingly, the petition for judicial review is dismissed.

REASONS FOR GRANTING THE PETITION

The First Circuit's ruling that § 106(c) bars post-deportation judicial review of final orders of deportation conflicts with decisions of four other circuits and cannot be reconciled either with the plain meaning of the statute or the guarantees of judicial review contained in Article III of the United States Constitution and the Due Process Clause of the Fifth Amendment. Courts and commentators alike that have addressed these issues have widely acknowledged the tremendous confusion they have caused among the lower courts, and have urged this Court to review these issues.

For these reasons, and because the questions presented are certain to recur given their broad application to judicial review of final orders of deportation and other forms of agency action, this Court should grant the petition.

I. THE COURT OF APPEALS' DECISION THAT § 106(C) PRECLUDES POST-DEPORTATION REVIEW OF FINAL ORDERS OF DEPORTATION CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS

The court of appeals' decision in this case raises fundamental questions concerning the rights of aliens illegally deported by the INS to seek judicial review and to safeguard the constitutional rights guaranteed them by the Due Process Clause of the Fifth Amendment and Article III of the Constitution. On this significant issue, the courts of appeals are hopelessly deadlocked and have openly invited review by this Court.

A. As the ruling below confirms, the federal courts are irreconcilably split over the question of whether § 106(c) of the Act bars post-deportation review of final orders of deportation. The First Circuit, in holding that the statute categorically precludes such review, expressly refused to follow the Ninth Circuit's decision in *Mendez v. INS*, 563 F.2d 956 (1977). In *Mendez*, the Ninth Circuit held that § 106(c) does not preclude post-deportation review where the deportation is effectuated without proper notice to the alien's counsel.

> We are of the opinion that "departure" in the context of [§ 106] cannot mean "departure in contravention of procedural due process." We hold that "departure" means "legally executed" departure when effected by the government. We base our holding on the Supreme Court's decision in *Delgadillo v. Carmichael*, 332 U.S. 388, 68 S. Ct. 10, 92 L. Ed. 17 (1947). In that case the Court held that an alien does not make an "entry" into the United States

> when he had no intent to "depart," or left involuntarily. * * * Appellee's contention that its decisions are immune from judicial review when the alien is physically out of the country without regard to the manner in which this "departure" was accomplished is just such a "captious interpretation."

Mendez, 563 F.2d at 958-59. Judge Trask's decision in *Mendez* consistently has been followed in the Ninth Circuit, and has since been adopted by the Sixth Circuit as well. See, *e.g.*, *Hajnal v. INS*, 980 F.2d 1247, 1247-48 (9th Cir. 1992) ("[i]t is well-established in our Circuit that § [106(c)] applies only in cases where the departure was 'legally executed'"); *Juarez v. INS*, 732 F.2d 58, 59-60 (6th Cir. 1984) ("'departure' in this context has been held to mean a 'legally executed' departure that does not violate procedural due process. * * * If [the alien] had left the United States under an order that contravened his constitutional right to due process, his departure would be no obstacle to court review of the order") (citing *Mendez*).[1]

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[1] Accord, *e.g.*, *Arreaza-Cruz v. INS*, 39 F.3d 909, 910-11 (9th Cir. 1994) (same); *Wiedersperg v. INS*, 896 F.2d 1179 (9th Cir. 1990) (alien entitled to post-deportation review in order to reopen proceedings where original deportation was based solely on invalid conviction); *Zepeda-Melendez v. INS*, 741 F.2d 285, 286 (9th Cir. 1984) ("[w]e hold that the court has jurisdiction to review a deportation order where an alien's departure was not lawfully executed, and we conclude that deportation without notice to the alien's counsel is not a lawful departure"); *Estrada-Rosales v. INS*, 645 F.2d 819, 820 (9th Cir. 1981) (in post-deportation proceedings "an alien may properly petition for review of his deportation when he seeks to challenge the regularity of the deportation proceeding"); *Thorsteinsson v. INS*, 724 F.2d 1365, 1367-68 (9th Cir.), cert. denied, 467 U.S. 1205 (1984) (same). See also *Joehar v. INS*, 957 F.2d 887, 889-90 (D.C. Cir. 1992) (noting that "[i]f there is any exception to the strict rule that a nonresident alien may not seek judicial review of

The Third and Eighth Circuits likewise have held that § 106(c) does not bar judicial review if the deportation violates the alien's due process rights. See, *e.g.*, *Camacho-Bordes v. INS*, 33 F.3d 26, 28 (8th Cir. 1994) ("we hold that, under [§ 106(c)], we have jurisdiction to review an order of deportation, after the alien has been forcibly deported, if the record reveals a colorable due process violation"); *Marrero v. INS*, 990 F.2d 772, 777 (3d Cir. 1993) (same); *Newton v. INS*, 622 F.2d 1193, 1195 (3d Cir. 1980) (noting that failure to provide proper notice to counsel in advance of alien's deportation would render the deportation "invalid because of this denial of procedural due process"). *Cf. Cipriano v. INS*, 24 F.3d 763, 764 (5th Cir. 1994) (permitting post-departure review of allegedly unconstitutional deportation order, and noting that the Court in *Mendoza-Lopez* "explicitly reserved the question at issue herein: whether post-departure judicial review of an allegedly unconstitutional deportation order is available in the context of deportation proceedings").

The First Circuit, on the other hand, in sharp conflict with these decisions, followed rulings of the Second, Fifth, and Tenth Circuits that final orders of deportation are immune from judicial scrutiny once an alien's deportation is carried out by the INS. See *Roldan v. Racette*, 984 F.2d 85, 90 (2d Cir. 1993) ("[w]e agree with the courts that have criticized *Mendez*. The

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a deportation proceeding, it involves an allegedly 'illegally executed' deportation," although venturing "no opinion upon the validity of that putative exception"); *Umanzor*, 782 F.2d at 1305 (Brown, J., dissenting) (citation omitted) ("Allowing the INS to effect such a 'departure' without notifying the alien's attorney would thwart an appellate court's jurisdiction to review deportation orders. I think the Ninth Circuit in *Mendez* was absolutely correct in deciding that a departure cannot bar judicial review when the alien's lawyer has received no notice of the order to report for deportation * * *").

pertinent language of § [106(c)] constitutes a clear jurisdictional bar, and admits of no exceptions"); *Umanzor v. Lambert*, 782 F.2d 1299 (5th Cir. 1986) (same); *Quezada v. INS*, 898 F.2d 474, 476-77 (5th Cir. 1990) (same); *Saadi v. INS*, 912 F.2d 428, 428 (10th Cir. 1990) (same). In *Umanzor*, the Fifth Circuit first expressed the rationale for interpreting § 106(c) as an absolute jurisdictional bar:

> We entertain serious reservations regarding the "*Mendez* exception" for, if the exception is taken to its logical conclusion, any error or procedural defect at any point in the alien's deportation saga * * * would render the departure illegal. This being so, any later allegation of procedural error by a deported alien would force the district court and the circuit courts to review the entire matter, despite the express determination of Congress that no such reviews should take place. Our reservations regarding the *Mendez* exception are reinforced by the course of its development in the circuit of its origins, the Ninth, where *Mendez* has become a sinkhole that has swallowed the rule of § [106(c)].

Umanzor, 782 F.2d at 1303 & n.5. See also *Quezada v. INS*, 898 F.2d 474, 476 (5th Cir. 1990) ("we reject *Mendez* today, as we did in *Umanzor*. * * * [W]e conclude that Congress 'meant what it said' when it provided that 'no court' may review a deportation order once deportation has occurred").

The conflict between the *Mendez* and *Umanzor* lines of circuit authority is undeniable and has been widely recognized. See, *e.g.*, *Roldan*, 984 F.2d at 89 ("[n]otwithstanding the unambiguous language of the statute, there is some conflict among the circuits as to the meaning of the provision of § [106(c)] at issue in this case") (describing conflict between *Mendez* and *Umanzor* lines of decisions); *Bar-Levy*, 990 F.2d

at 36 ("there is a sharp conflict among the circuits as to the meaning of the jurisdictional bar set forth in § [106(c)]"); *Camacho-Bordes*, 33 F.3d at 27 ("[t]here is a split among the circuits as to the meaning of 'departed' in INA § 106(c)"); *Motta v. District Director*, 869 F. Supp. 80, 87 n.7 (D. Mass. 1994) ("[t]here is a split among the circuits concerning the scope of Section [106(c)]").

The need for review of the question presented in this case is apparent not only because of the circuit split it has engendered but also because of the serious burden it has imposed on the federal court system. Indeed, the confusion in the circuits runs far deeper than just the question *whether* final orders of deportation are subject to post-deportation judicial review, but also *when* such review is permissible. Four circuits, including the First Circuit below, have interpreted § 106(c) as an absolute "jurisdictional bar," under which "no court' may review a deportation order once deportation has occurred." *Quezada*, 898 F.2d at 477. See also, *e.g.*, *Roldan*, 984 F.2d at 90 (same). The Sixth and Ninth Circuits, on the other hand, have taken the view that § 106(c) is a "general rule" that only precludes judicial review where a "departure" is "legally executed." *Mendez*, 563 F.2d at 958; *Juarez*, 732 F.2d at 59-60 (adopting *Mendez* rule). The Third and Eighth Circuits in turn have adopted "a middle ground and hold that [a court] has jurisdiction to review an order of deportation after the alien has been forcibly deported if the record reveals a colorable due process claim." *Marrero*, 990 F.2d at 777. Accord *Camacho-Bordes*, 33 F.3d at 28 ("we agree with the analysis in *Marrero v. INS* and adopt the Third Circuit's middle position between the Ninth Circuit's *Mendez* exception and the Fifth Circuit's strict lack of jurisdiction view").

B. The prejudice to petitioner and others similarly situated resulting from this circuit conflict is readily apparent. Indeed, had petitioner resided within any of the four circuits

that permit post-deportation judicial review, he would have been afforded the right not only to challenge the Board's final order of deportation and its arbitrary denial of § 212(c) relief, but also to seek judicial review of the INS' "eleventh-hour notice" of his deportation and its unconstitutional deprivation of his right to counsel.

Under the law of the Sixth and Ninth Circuits, for example, petitioner would have been entitled to post-deportation review since his deportation was not "legally executed." *Juarez*, 732 F.2d at 59-60; *Mendez*, 563 F.2d at 958-59. Indeed, each of those Circuits has held that the INS' failure to follow its own regulations justifies post-deportation review. See *Mendez*, 563 F.2d at 959; *Juarez*, 732 F.2d at 59. In this case, it is indisputable that the INS violated petitioner's statutory right to counsel and its own regulations by failing to provide counsel with 72 hours notice of petitioner's deportation, and by failing to serve him with a copy of the Board's final order of deportation. See 8 C.F.R. § 243.3(b) (requiring 72 hours notice of deportation); 8 C.F.R. § 292.5 (requiring notice to counsel representing alien). See also *Zepeda-Melendez*, 741 F.2d at 288 (holding that §§ 243.3(b) and 292.5 require 72 hours notice to counsel before deportation, and that "[a]t a minimum, an alien's counsel must be made aware of the alien's deportation in order to provide representation. We hold, therefore, that the agency's deportation of Zepeda without notice to his counsel violated Zepeda's section 1252(b) right to counsel"); *Mendez*, 563 F.2d at 959 (reversing deportation order because failure to notify counsel of deportation violated INS regulations).

Petitioner likewise would have been afforded post-deportation review under Third and Eighth Circuit law as well since the record below plainly reveals a "colorable" due process violation. See *Marrero*, 990 F.2d at 777; *Camacho-Bordes*, 33 F.3d at 28. In the first place, the INS violated petitioner's right to due process by impeding his statutory right to counsel and

failing to give counsel 72 hours notice of his deportation. 8 U.S.C. § 1252(b); 8 C.F.R. § 243.3; 8 C.F.R. § 292.5. Indeed, the record shows that counsel *never* received such notice from the INS, and that the few hours' notice he received from petitioner's family provided no meaningful opportunity either to review the Board's final order of deportation or to consider and/or pursue any appellate remedies. *Cf. Gonzalez-Julio v. INS*, 34 F.3d 820, 825 (9th Cir. 1994) (holding that regulation granting aliens *10 days* in which to appeal to the Board provided insufficient time to appeal and thus violated due process requirements because "the risk of erroneous deprivation of the petitioner's interest in filing an appeal is substantial"). Under the circumstances of this case, the Third and Eighth Circuits each have recognized a violation of procedural due process. *Marrero*, 990 F.2d at 777 (failure to serve attorney supported by record constituted colorable procedural due process violation claim); *Newton v. INS*, 622 F.2d 1193 (3d Cir. 1980) (failure properly to notify counsel can constitute denial of procedural due process).

The INS' failure to provide timely notice to counsel of petitioner's deportation also constituted a violation of his Fifth Amendment due process right to counsel, and likewise would have entitled petitioner to post-deportation review in any of the four circuits that permit such review. It is well-established that the Due Process Clause protects the rights of aliens to be represented by counsel of their choice in cases such as this where the absence of counsel would be prejudicial. See, *e.g.*, *Baires v. INS*, 856 F.2d 89, 91 & n.2 (9th Cir. 1988) ("if prejudice to the alien is sufficiently great, the constitutional guarantee of due process may be violated"); *United States v. Saucedo-Velasquez*, 843 F.2d 832, 835 n.2 (5th Cir. 1988) ("[a]n alien does * * * have a right to counsel if the absence of counsel would violate due process under the Fifth Amendment"). This right to counsel includes not only right to retain

counsel, but to have counsel meaningfully perform his or her functions without governmental interference. See *Baires*, 856 F.2d at 91 n.2 ("[w]e have characterized the alien's right to counsel of choice as 'fundamental' and have warned the INS not to treat it casually. As we have also said, that right must be respected in substance as well as in name"). Here, the INS' "eleventh-hour notice" (App., *infra*, 16a) of petitioner's deportation and its failure to serve counsel with the Board's final order of deportation clearly deprived petitioner of his statutory and constitutional right to counsel, and would have entitled him to post-deportation review in any of the four Circuits that permit it.

In sum, the importance of resolving the meaning the meaning of § 106(c) has been widely acknowledged by the courts and commentators that have addressed the issue. The courts have struggled for almost twenty years since *Mendez* was first decided to determine the availability and scope of post-deportation judicial review, and have failed to reach any consensus. Since this Court left the question open in *United States v. Mendoza-Lopez*, 481 U.S. at 837 & n.13, the courts of appeals have taken three sharply conflicting approaches to resolving this question, and with time have become hopelessly deadlocked. Recently, the circuits thus have treated this as an "open" question "explicitly reserved" by this Court (App., *infra*, 10a n.5; *Cipriano*, 24 F.3d at 764 & n.9), and have recognized it as one that "calls for resolution by the Supreme Court." *Bar-Levy*, 990 F.2d at 36. See also T. Aleinikoff & D. Martin, IMMIGRATION: PROCESS AND POLICY 933-34 (2d ed. 1991) (noting circuit split over availability of post-deportation review). For all of these reasons, review of this question by the Court is warranted.

II. THE COURT OF APPEALS' HOLDING THAT § 106(C) PRECLUDES POST-DEPORTATION REVIEW OF FINAL ORDERS OF DEPORTATION DISREGARDS THE PLAIN MEANING OF THE STATUTE

In construing the term "departed" in § 106(c) to include deportations, and by interpreting the statute to mean that the INS can avoid judicial review of deportation orders simply by carrying them out, the First Circuit below not only disregarded the statute's plain meaning and the particular use of the term "depart" throughout the INA, but it also overlooked the entire scheme of judicial review established in § 106. Indeed, the First Circuit's ruling reflects precisely the sort of "captious interpretation" of the INA which this Court rejected in *Delgadillo v. Carmichael*, 332 U.S. 388 (1947).

A. On its face, § 106(c) precludes judicial review of a deportation order once an alien "has departed from the United States after issuance of the order." In its ruling below, the First Circuit held that the term "departed" must be interpreted to include not only voluntary departures, but involuntary departures (*i.e.*, deportations) as well:

> we do not believe that there is any principled way to interpret the word "departed" as failing to encompass the most relevant type of departures--involuntary departures by way of deportation. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 604 (1986) (defining "depart" to include "to go forth or away: set forth: LEAVE").

App., *infra*, 11a. Yet, in looking to the dictionary to support its reading of the statute, the court of appeals overlooked the contrasting usages and meanings of the terms "deport" and "depart" throughout the INA, and altogether ignored the remaining text of § 106(c), which likewise confirms that its use of the term "departed" does not include deportations. Indeed,

when read in context, it becomes clear that § 106(c) is *not* a statutory back door through which § 106's carefully laid out system of judicial review can be avoided. Rather, it serves the much more modest role of ensuring that judicial review is unavailable to those who willingly comply with deportation orders and depart on their own.

By holding that final orders of deportation are unreviewable after an alien is deported, the First Circuit and other courts effectively have rendered the judicial review process of § 106(a) meaningless. Section 106(a)(1) provides 90 days for an alien to file a petition for review with the court of appeals (30 days for an alien convicted of an aggravated felony), at which point deportation is automatically stayed upon service of the petition on the INS. According to the court of appeals, however, § 106(c) obliquely grants to the INS the unfettered ability to short-circuit this review process altogether. So long as the INS can get to the alien first and ensure that he has "departed" before he gets to the courthouse, the period for review is cut off, whether it has been running a day, a week or a month. As explained by the Ninth Circuit in *Mendez*, the INS would be able "to thwart the jurisdiction of [the courts] where the alien had been 'kidnapped' and removed as easily as it would apply to [a] case involving deportation in derogation of procedural due process." 563 F.2d at 959. What the statute gives with one hand, the INS would be empowered to take away at its whim, thereby subverting the entire purpose and structure of § 106. As Judge Brown explained in *Umanzor*:

> If § [106(c)] "departure" encompassed *all* departures regardless of whether the alien's attorney has been properly notified, the [three-]month grace period to file a petition for review of a deportation order would be rendered meaningless. Congress cannot have intended for such an anomaly to exist in the statutory scheme of § [106].

782 F.2d at 1305 (dissenting opinion) (emphasis in original). Indeed, such a reading of the statute not only is patently untenable and serves no legitimate policy purpose, but violates the "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." *Colautti v. Franklin*, 439 U.S. 379, 392 (1979).

In enacting § 106, Congress acted with the expressed desire *not* to impose an "undue limitation" upon the alien's ability to seek judicial review, but instead to allow the alien sufficient time to "ponder[] the propriety of the deportation order against him" and "to determine whether he really has a case upon which he should seek judicial review and to prepare therefor." H.R. Rep. No. 1086, 87th Cong., 1st Sess. (1961), reprinted in 1961 U.S.C.C.A.N. 2950, 2973-74. As explained by then-Deputy Attorney General Byron R. White, "[a]liens seeking review of administrative orders should be given full and fair opportunity to do so * * * [and have] their day in court." *Id.* at 2968.[2]

In any event, as used in the INA, the term "depart" plainly means an absence from the United States *other than by*

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[2] Indeed, the First Circuit's interpretation of § 106(c) would leave aliens with no alternative but to file and serve petitions for review as soon as the Board rules so as to protect their ability to seek judicial review. Inducing such automatic resort to the appellate process hardly serves the basic legislative purpose behind § 106 of "expedit-[ing] the deportation of undesirable aliens by preventing successive dilatory appeals." *Cheng Fan Kwok v. INS*, 392 U.S. 206, 214 (1968). See also Comment, *Deportation and Exclusion: A Continuing Dialogue Between Congress and the Courts*, 71 YALE L.J. 760, 760 & n.4 (1962) (noting that the "explicit goal of the section . . . was to prevent the use of judicial review to delay execution of [deportation and exclusion] orders," a feeling "reflected on virtually every page" of the House Report).

deportation. For example, § 242(f) of the Act, 8 U.S.C. § 1252(f), provides for deportation of an alien who has "unlawfully reentered the United States having previously *departed or been deported* pursuant to an order of deportation" (emphasis added). Accord 8 U.S.C. § 1323(d) (authorizing the Attorney General to prescribe regulations for "the ultimate *departure or removal or deportation*" of alien stowaways) (emphasis added); 8 C.F.R. § 264.1(d) (requiring an alien's registration to be surrendered if he "is naturalized, dies, permanently *departs, or is deported*") (emphasis added). In fact, the term "depart" is used repeatedly throughout the INA to refer to aliens who leave the United States on their own rather than by deportation. See, *e.g.*, 8 U.S.C. § 1254(e); 8 U.S.C. § 1252b(e); 8 U.S.C. § 1184(d); 8 U.S.C. § 1101(g).

That the terms "depart" and "deport" are used disjunctively by Congress throughout the INA itself demonstrates that they carry different meanings within § 106(c). As this Court often has explained, when terms "are each separated by the conjunction 'or' * * * [c]anons of construction indicate that terms connected in the disjunctive in this manner be given separate meanings." *Garcia v. United States*, 469 U.S. 70, 73 (1984) (citing *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979)). See also *Brooke Group v. Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578, 2591 (1993) (same). These different meanings likewise apply to § 106(c) given "the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990). Accord *United States Nat'l Bank v. Independent Ins. Agents of America, Inc.*, 113 S. Ct. 2173, 2185 (1993) (same).

In reaching its decision below, however, the court of appeals relied solely upon the apparent "plain meaning" of the term "depart." Yet, "the meaning of statutory language, plain or not, depends on context" (*King v. St. Vincent's Hospital*, 502

U.S. 215, 221 (1991)), since "the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Deal v. United States*, 113 S. Ct. 1993, 1996 (1993). Indeed, the First Circuit's dictionary construction of § 106(c) is entirely divorced from the statute's context and meaning. For if the term "departed" in § 106(c) necessarily encompasses deportations, Congress' effort to distinguish those terms throughout the text of the INA would be redundant—an outcome that this Court consistently has endeavored to avoid. See, *e.g.*, *Kungys v. United States*, 485 U.S. 759, 778 (1988).

A complete reading of § 106(c) also demonstrates that the statute's purpose is to define those circumstances in which *the alien*, not the INS, can forfeit the right to judicial review. Under § 106(c), judicial review is lost if "*the alien* has not exhausted the administrative remedies available to him * * * or if *he* has departed from the United States after the issuance of the order" (emphasis added). It is only in this fashion that § 106(c) can faithfully be interpreted, particularly given that any other construction would ascribe to Congress the extraordinary and unprecedented purpose of indirectly granting to an agency the unreviewable authority to insulate itself from judicial scrutiny. See *Camacho-Bordes*, 33 F.3d at 28 ("we are reluctant to substitute 'deported' for the statutory term 'departed' when to do so would effectively leave the courts with no way to protect the fundamental due process rights of aliens"); *Marrero*, 990 F.2d at 777 ("[w]e are reluctant to substitute the word 'deported' when a right so fundamental as due process is at stake"). See also, *e.g.*, 3 Gordon & Mailman, IMMIGRATION LAW & PROCEDURE § 81.05[1], at 81-58-60 (1994) (describing alternative view as "questionable"); T. Aleinikoff & D. Martin, IMMIGRATION: PROCESS & POLICY 933-36 (2d ed. 1991) (questioning Fifth Circuit view to the contrary); Comment, *Deportation and Exclusion: A Continuing Dialogue Between Congress and the Courts*, 71 YALE L.J. 760, 789 n.141 (1962)

("[n]otwithstanding the broad language of § [106](c), the courts will probably limit it to cases where the departure was voluntary").

In short, the First Circuit's interpretation of § 106(c) is fundamentally inconsistent with both the meaning of the statute and the structure of § 106, and must for these reasons be rejected.[3] *Gade v. National Solid Wastes Management Ass'n*, 112 S. Ct. 2374, 2384 (1992); *Eli Lilly & Co. v. Medtronic, Inc.*, 496 U.S. 661, 668-69 (1990); *United Sav. Ass'n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 59 (1987). Not only does the court's ruling vitiate the statute's scheme of judicial review, but it grants to the INS the limitless ability to divest the federal courts of the ability to scrutinize its action and to remedy constitution violations. In *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947), this Court warned that "[r]espect for the law does not thrive on captious interpretations," and rejected a reading of the INA similar to that now embraced by the court of appeals. This Court held that to construe an arrival in the United States following an *involuntary* departure as an "entry" under the INA was "too irrational to square with the statutory scheme" since the alien could never have intended to depart in the first place. In this case, it is likewise apparent that Congress did not intend to characterize those who have been involuntary deported as having "departed" under § 106(c) and thereby waived the right to judicial review.

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[3] The First Circuit's ruling also cannot be squared with the "well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action," *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 496 (1991), a presumption that plainly would be offended by interpreting § 106(c) to subvert the thrust of § 106 and vest in the INS the unilateral power to prevent judicial review of its actions in such an oblique fashion.

III. AS INTERPRETED BY THE COURT OF APPEALS, § 106(C) RAISES SERIOUS CONSTITUTIONAL QUESTIONS THAT REQUIRE SUPREME COURT REVIEW

The First Circuit's holding that § 106(c) absolutely bars judicial review even to consider colorable due process claims also must be rejected because such a construction would render the statute unconstitutional—an outcome that must be avoided if at all possible. Indeed, on several occasions this Court has refused to preclude judicial review of administrative action "to avoid 'the serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Webster v. Doe*, 486 U.S. 592, 603 (1988) (citing *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681 n.12 (1986)). See also *Johnson v. Robison*, 415 U.S. 361, 366-67 (1974) (same); R. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 372 n.347 (1993) (noting the Court's willingness to use "every resource of statutory construction" to avoid such constructions).[4]

In its decision below, however, the court of appeals concluded that "the strict construction that the language of the statute demands passes constitutional muster," and that there exists "no constitutional infirmity in the outright denial of appellate review following an alien's deportation." App., *infra*, 12a n.7. The court based this conclusion upon the principle that Congress has not invested the federal courts with all the

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[4] See also generally *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 465-66 (1989); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *Lynch v. Overholser*, 369 U.S. 705, 711 (1962) ("statute should be interpreted, if fairly possible, in such a way as to free it from not insubstantial constitutional doubts").

jurisdiction that it was authorized to bestow under Article III of the Constitution. *Id.* (citing *Ankenbrandt v. Richards*, 112 S. Ct. 2206, 2212 (1992)). In fact, however, the constitutionality of § 106(c) as interpreted by the court of appeals has nothing to do with whether the jurisdiction of the federal courts extends to the limits of Article III. Rather, it involves "profound and long-debated questions about the power of Congress, consistent with Article III, to preclude all judicial review of executive agency action." *Marozsan v. United States*, 852 F.2d 1469, 1479 (7th Cir. 1988) (en banc).[5]

Courts and commentators alike have acknowledged the "confusion" and "disarray" that exists as to the constitutional necessity of judicial review over action by the executive branch.[6] No modern court, however, has gone so far as to

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[5] These constitutional concerns are especially apparent in cases such as this where Congress *does* choose to allocate judicial power, but invests it in a non-Article III body without adequate assurance of oversight by an Article III court. See H. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 16 (1983) ("[t]here is, in principle, a clear difference between excluding the article III courts entirely from a case and restricting their law-declaring competence once 'judicial power' is, in fact, brought to bear on a controversy").

[6] Fallon, 93 COLUM. L. REV. at 309. See also D. Meltzer, *Legislative Courts, Legislative Power, and the Constitution*, 65 IND. L.J. 291, 299, 304 (1990) (arguing that Article III and the Due Process Clause have independent significance as guarantors of judicial review, and noting that the current debate "leaves open large questions about the necessity and scope of judicial review"); A. Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 451 (1989) (noting this uncertainty even though "[t]he Supreme Court has grappled with this question on no fewer than four occasions in the 1980s"); P. Bator,

suggest, as has the court of appeals below, that Congress may altogether preclude judicial review—of any scope, for all claims, factual, legal or constitutional—of coercive agency action. In fact, this Court's decisions strongly suggest to the contrary. See *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 69 n.23 (1982) (plurality opinion). For where such agency action is involved, surely "the constitutional requirement of due process is a requirement of judicial process." *Crowell v. Benson*, 285 U.S. 22, 87 (1932) (Brandeis, J., dissenting). Accord, *e.g.*, *Marozsan*, 852 F.2d at 1479 (holding that statute foreclosing judicial review of Veterans' Administration actions could not preclude judicial review over constitutional claims since "the federal judiciary's responsibility to review constitutional challenges would be hollow indeed if federal executive agencies, immune from judicial review, could circumvent the Constitution at will"); *Ralpho v. Bell*, 569 F.2d 607, 620 (D.C. Cir. 1977) ("if legislation by Congress purporting to prevent judicial scrutiny of the constitutionality of its own actions is itself constitutionally suspect, legislation that frees an administrative agency from judicial scrutiny of its adherence to the dictates of the Constitution must pose grave constitutional questions as well").

Although tribunals like the Board in this case exercise a quasi-judicial function, it is clear that Article III imposes limits on Congress' ability to immunize such bodies from oversight by Article III courts. See R. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 950-74 (1988) ("the rule of law requires that a administrative determinations of legal rights be open to review and thus to correction by the courts"); Amar, 56 U. CHI. L. REV. at 451 n.43 (agency adjudications "must generally be reviewable by

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The Constitution as Architecture: Legislative and Administrative Courts Under Article III, 65 IND. L.J. 233, 269 (1990).

Article III tribunals to guarantee conformity with federal law, as expounded by the Article III judiciary"); G. Young, *Public Rights and the Federal Judicial Power: From Murray's Lessee Through Crowell to Schor*, 35 BUFF. L. REV. 765, 768 (1986). And while it may be that immigration disputes involve so-called "public rights" — rights governing relationships "between the government and others" (see *Northern Pipeline*, 458 U.S. at 69), this Court never has endorsed the view "that Article III has no force simply because a dispute is between the Government and an individual." *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 586 (1985). As this Court explained in *Northern Pipeline*, 458 U.S. at 69 n.23 (emphasis added):

> even with respect to matters that arguably fall within the scope of the "public rights" doctrine, the presumption is in favor of Art. III courts. * * * *Moreover, when Congress assigns these matters to administrative agencies, or to legislative courts, it has generally provided, and we have suggested that it may be required to provide, for Art. III judicial review.*

In cases such as this, the need for Article III judicial review is especially compelling since the agency action involved is coercive in nature and is being attacked as unconstitutional and legally unauthorized. The separation-of-powers values embodied in Article III and its related concerns of individual fairness thus are fully implicated. See Fallon, 101 HARV. L. REV. at 950-52, 961-62, 975-89; H.M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1384 (1953) (requirement of judicial review should be triggered when coercive agency order is involved). See also *Union Carbide*, 473 U.S. at 591 (availability of judicial enforcement of agency determinations is relevant to Article III review requirements).

For decades this Court has recognized that deportation proceedings involve "issues basic to human liberty and happiness and, in the present upheavals in lands to which aliens may be returned, perhaps to life itself." *Wong Yang Sung v. McGrath*, 339 U.S. 33, 50 (1950). For this reason, the Court has stressed that "[m]eticulous care must be exercised lest the procedure by which [an alien] is deprived of that liberty not meet the essential standards of fairness." *Bridges v. Wixon*, 326 U.S. 135, 154 (1945). As read by the court of appeals, however, § 106(c) gives the INS the unilateral ability to take away all of these procedural safeguards. Such a reading cannot be squared with this Court's Article III jurisprudence.

In addition to Article III's requirements, the Due Process Clause of the Fifth Amendment also prevents Congress from completely shutting off judicial review in deportation proceedings. Indeed, in *Ng Fung Ho v. White*, 259 U.S. 276 (1922), this Court unanimously held, applying the Due Process Clause, that because deportation "obviously deprives [an alien] of liberty * * * [and] may result also in loss of both property and life, or of all that makes life worth living," and because of "the difference in security of judicial over administrative action," the executive may not deport an alien making a colorable claim of citizenship without affording him an opportunity for a judicial determination of his claim. *Id.* at 285. Since *Ng Fung Ho*, the Court has continued to stress that the Constitution requires that "judicial intervention in deportation cases" be meaningfully available. See *Heikkila v. Barber*, 345 U.S. 229, 235 (1953).[7]

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[7] See also, *e.g.*, *Superintendent v. Hill*, 472 U.S. 445, 449 (1985) (noting that decisions of this Court "suggest that due process might require some form of judicial review of administrative decisions that threaten constitutionally protected liberty or property interests"); *Estep v. United States*, 327 U.S. 114, 120 (1946) ("[j]udicial review [of agency action] may indeed be required by the Constitution")

Admittedly, "[t]he extent to which legislatures may commit to an administrative body the unreviewable authority to make determinations implicating fundamental rights is a difficult question of constitutional law." *Superintendent v. Hill*, 472 U.S. 445, 450 (1985). However, the court of appeals' holding that Congress could constitutionally insulate the INS from judicial scrutiny even in the face of colorable due process violations explicitly calls for resolution of the fundamental question of the extent to which Article III and the Due Process Clause require judicial review. Presently, this Court's decisions

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(citing *Ng Fung Ho*); *Califano v. Sanders*, 430 U.S. 99, 109 (1977) ("[c]onstitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions"). *Cf. St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 84 (1936) (Brandeis, J., concurring) ("[t]he supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law applied and whether the proceeding in which facts were adjudicated was conducted regularly. To that extent, the person asserting a right, whatever its source, should be entitled to the independent judgment of a court on the ultimate question of constitutionality"). Accord Fallon, 93 COLUM. L. REV. at 313 ("it is widely held that there is a constitutional right to judicial review of every alleged violation of a constitutional right") (citing R. Pierce, Jr., ADMINISTRATIVE LAW AND PROCESS § 5.2, at 118 (2d ed. 1992) (concluding that "[d]espite the dearth of case law on the issue, dicta in several cases and scholarly analysis suggest strongly that there is a constitutional right to judicial review of constitutional issues raised by agency action"); B. Schwartz, ADMINISTRATIVE LAW § 8.6, at 482-83 (3d ed. 1991) (same)); Hart, 66 HARV. L. REV. at 1390 ("the courts [have] a responsibility to see that statutory authority was not transgressed, that a reasonable procedure was used in exercising the authority, and -- seemingly also -- that human beings were not unreasonably subjected, even by direction of Congress, to an uncontrolled official discretion").

do not provide a definitive answer to this question, and the courts of appeals have been unable to reach a consensus on their own. As noted by Professor Fallon, "[t]he Supreme Court has failed to speak unequivocally about questions of entitlement to judicial review." 93 COLUM. L. REV. at 333. Accord 5 K. Davis, ADMINISTRATIVE LAW TREATISE § 28:3, at 264 (2d ed. 1984) ("[w]hether a statute that bars judicial review of a substantial constitutional issue would be constitutional has no clear answer in present law. * * * [t]he lower courts have reacted variously to the question"); G. Young, *Public Rights and the Federal Judicial Power: From Murray's Lessee Through Crowell To Schor*, 35 BUFF. L. REV. 765, 869 (1986).

For all of these reasons, and because of the certainty that these constitutional questions will recur given their far-reaching implications for all forms of judicial review of agency action, review by this Court is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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